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### IMPLICIT APPROVAL OF INCIDENTAL INTERCEPTION UNDER TITLE III

#### *United States v. Masciarelli*

Title III of the Omnibus Crime Control and Safe Streets Act of 1968<sup>1</sup> represents a Congressional attempt to provide an effective means of controlling crime by the use of wiretapping and electronic surveillance while insuring that individual privacy is safeguarded.<sup>2</sup> The provisions of Title III generally prohibit the nonconsensual interception of private communications except where it is undertaken in connection with the investigation of certain designated offenses.<sup>3</sup> Basic to the statutory scheme is a provision requiring prior judicial authorization of such interceptions, which may be obtained only upon a showing that there exists probable cause to believe that one of the specified crimes has been or will be committed.<sup>4</sup> As an excep-

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<sup>1</sup> 18 U.S.C. §§ 2510-2520 (1970 & Supp. V 1975).

<sup>2</sup> S. REP. No. 1097, 90th Cong., 2d Sess. 66, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2153 wherein it is stated: "Title III has as its dual purpose (1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized."

<sup>3</sup> As one of Title III's avowed purposes is to combat organized crime, see S. REP. No. 1097, 90th Cong., 2d Sess. 80, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2157, many of the crimes for which wiretap authorization may be obtained are those which Congress determined to be most related to the endeavors of organized crime, including murder, kidnap, bribery, extortion, bribery of public officials or witnesses, bribery in sporting contests, obstructing criminal investigations, racketeering, counterfeiting, narcotics violations, and loan-sharking. 18 U.S.C. § 2516(1)(b)-(f) (1970).

Title III specifically excepts certain surveillance from its substantive and procedural provisions. Section 2511(2)(a)-(b), 18 U.S.C. § 2511(2)(a)-(b) (1970), exempts activities of employees of communications, common carriers and the Federal Communications Commission. Additionally, under § 2511(2)(c)-(d), 18 U.S.C. § 2511(2)(c)-(d) (1970), consensual interceptions neither tortious nor criminal in nature made by private citizens or persons acting under color of law are exempted. For an in-depth study of Title III and the consent exception, see Fishman, *The Interception of Communications Without a Court Order: Title III, Consent, and the Expectation of Privacy*, 51 ST. JOHN'S L. REV. 41 (1976). The Chief Executive's power to protect national security by means of electronic surveillance is also without Title III's proscriptive ambit. 18 U.S.C. § 2511(3) (1970). See also *United States v. United States District Court*, 407 U.S. 297 (1972); S. REP. No. 1097, 90th Cong., 2d Sess. 94, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2182.

<sup>4</sup> Prior to any interception, an order from a judge of competent jurisdiction must be obtained by filing an application which sets forth with particularity the identity of the official seeking the order, a full description of the crime and individuals involved, and a statement that other investigative procedures have been tried and have proved unsuccessful or too dangerous. 18 U.S.C. § 2518(1)(a)-(e) (1970). Before the order is issued, a judge must make a determination that probable cause exists to justify the interception. *Id.* § 2518(3)(a)-(d). The order must specify the identity of the person whose conversation is to be intercepted, the location of the interception, the type of communication to be intercepted, the identity of the agent authorized to effect the interception, and the period for which interception is authorized. *Id.* § 2518(4)(a)-(e). The statute also provides that once the evidence sought is obtained,

tion to the requirement of prior authorization, section 2517(5) of Title III provides that evidence of an offense not specified in the original order which is intercepted during the course of a legal interception may be admitted in a criminal proceeding if authorized by a subsequent judicial order.<sup>5</sup> Recently, in *United States v. Masciarelli*,<sup>6</sup> the Second Circuit held such subsequent authorization was implicitly granted where the judge who issued the original wiretap order was fully apprised of the reception of evidence relating to an unspecified offense by a progress report<sup>7</sup> and thereafter approved continuation of the wiretap.<sup>8</sup>

In *Masciarelli*, the F.B.I. had obtained an order from a district court judge permitting a wiretap on a telephone used by the defendant, Masciarelli, who was suspected of conducting a gambling business in violation of both New York and federal law.<sup>9</sup> The order authorized interceptions of communications relating to the operation of an illegal gambling business for a period of 15 days and required the government to submit interim progress reports on the fifth and tenth days of surveillance.<sup>10</sup> Among the numerous calls intercepted<sup>11</sup> was one between Masciarelli in New York and defendant Schultz in Ohio. During this conversation, Masciarelli agreed to purchase information from Schultz which could be used to establish "point spreads" in sports betting.<sup>12</sup> A description of this conversation was included in the fifth-day report to the district judge, who

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the interception is to be discontinued. In no event may the interception last longer than 30 days, although unlimited extensions may be granted. *Id.* § 2518(5).

<sup>5</sup> *Id.* § 2517(5). Intercepted communications relating to a crime unspecified in the wiretap order may be admitted at a trial or grand jury proceeding "when authorized or approved by a judge of competent jurisdiction where such judge finds on subsequent application that the contents were otherwise intercepted in accordance with the provisions of this chapter. Such application shall be made as soon as practicable." *Id.*

<sup>6</sup> 558 F.2d 1064 (2d Cir. 1977).

<sup>7</sup> 18 U.S.C. § 2518(6) (1970), provides:

Whenever an order authorizing interception is entered pursuant to this chapter, the order may require reports to be made to the judge who issued the order showing what progress has been made toward achievement of the authorized objective and the need for continued interception. Such reports shall be made at such intervals as the judge may require.

<sup>8</sup> 558 F.2d at 1069.

<sup>9</sup> 18 U.S.C. § 1955 (1970 & Supp. V 1975) prohibits illegal gambling businesses which violate state law, involve more than four persons, and have been in operation for at least 31 days or generate revenue of \$2000.00 in any one day. Article 225 of New York's Penal Law makes it illegal to operate a gambling business or lottery in New York. N.Y. PENAL LAW §§ 225.00-.40 (McKinney 1967 & Supp. 1977-1978).

<sup>10</sup> 558 F.2d at 1065; see note 7 *supra*.

<sup>11</sup> In its fifth-day report, the government reported that of the 283 calls intercepted, 275 were related to the gambling business violations. 558 F.2d at 1065.

<sup>12</sup> *Id.*

authorized the wiretap to continue. At the conclusion of the investigation, tapes of all intercepted calls were presented to a federal grand jury. Masciarelli and nine others were indicted for operating a gambling business,<sup>13</sup> and, on the basis of their New York-Ohio conversation, Masciarelli and Schultz were charged in a separate indictment with interstate transmission of wagering information.<sup>14</sup>

Both Masciarelli and Schultz moved to suppress the interstate conversation<sup>15</sup> and dismiss the transmitting-gambling-information indictment<sup>16</sup> on the ground that interceptions of evidence relating to this offense were not specified in the original wiretap order. It was urged that the government's failure to timely secure from the district court judge express authorization to utilize the conversation in a prosecution for the unspecified crime rendered the evidence inadmissible under section 2517(5).<sup>17</sup> Finding that the filing of the fifth-day report followed by the authorization to continue surveillance did not constitute approval within the meaning of 2517(5), the district court dismissed the indictment.<sup>18</sup>

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<sup>13</sup> *Id.* at 1065-66.

<sup>14</sup> *Id.* 18 U.S.C. § 1084(a) (1970) provides:

Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

<sup>15</sup> When disclosure of information intercepted would be in violation of Title III, no part of that information or evidence derived therefrom may be admitted "in any trial, hearing, or other proceeding in or before any court [or] grand jury . . ." *Id.* § 2515. If the communication is obtained illegally or without proper authorization, an "aggrieved person" may move to suppress the contents of that interception. *Id.* § 2518(10)(a)(i). In *United States v. Giordano*, 416 U.S. 505 (1974), the Supreme Court held that for suppression to result it is not necessary that the interception be unconstitutional; intercepted information will be suppressed "where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures . . ." *Id.* at 527.

<sup>16</sup> Where illegally obtained information is presented to a grand jury which hands down an indictment, a motion to dismiss the indictment will often be granted. See *United States v. Tane*, 329 F.2d 848, 853 (2d Cir. 1964) (indictment of union official based on testimony derived from unlawful wiretap dismissed); *United States v. Guglielmo*, 245 F. Supp. 534, 536 (N.D. Ill. 1965), *aff'd sub nom. United States v. Dote*, 371 F.2d 176 (7th Cir. 1966) (evidence based on illegal wiretap held inadmissible and gambling indictment dismissed).

<sup>17</sup> 558 F.2d at 1066.

<sup>18</sup> *Id.* Although stating that he would have held differently had he been "writing on a clean slate," *id.*, District Court Judge Port indicated his belief that the decisions in *United States v. Marion*, 535 F.2d 697 (2d Cir. 1976), and *United States v. Brodson*, 528 F.2d 214 (7th Cir. 1975), required that the indictment be dismissed. Both cases held that where evidence of an unspecified offense is intercepted, subsequent judicial approval must be ob-

The Second Circuit reversed and reinstated the indictment, holding that the judicial authorization required by section 2517(5) was implicitly granted when the lower court judge authorized the continuation of the wiretap after having read the government's fifth-day report.<sup>19</sup> Judge Mansfield, who authored the unanimous opinion, noted that where evidence of an unspecified offense is intercepted during an authorized wiretap, the admissibility of this evidence is dependent on the government obtaining judicial approval under section 2517(5). Such approval may be granted upon "a showing that the original order was lawfully obtained, that it was sought in good faith and not as subterfuge search, and that the communication was in fact incidentally intercepted during the course of a lawfully executed order."<sup>20</sup> The court found that probable cause for and the good faith of the initial order were firmly established by the existence of a large number of intercepted conversations which related to the gambling-business offense specified in the interception order.<sup>21</sup> Additionally, the fact that the challenged conversation was probative of the gambling-operation violation indicated to the court that the original order was not obtained as a pretext.<sup>22</sup> Relying upon its earlier decision in *United States v. Tortorello*,<sup>23</sup> which found implied approval based upon renewal and amendment applications filed with the issuing judge,<sup>24</sup> the Second Circuit determined that express approval is not the sole means of obtaining 2517(5) authorization;<sup>25</sup> as the *Tortorello* court stated, "[i]t is enough that notification of the interception of evidence not authorized by the original order be clearly provided in the renewal and amendment application papers."<sup>26</sup> Analogizing the government's progress report to the renewal and amendment papers presented in *Tortorello*, Judge Mansfield concluded that the filing of the progress report, coupled with the district court's subsequent approval of further wiretapping, amounted to an implied authorization under section 2517(5).<sup>27</sup>

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tained pursuant to § 2517(5), despite the similarity of the unspecified offense to the offense named in the original order. See *United States v. Marion*, 535 F.2d at 706; *United States v. Brodson*, 528 F.2d at 216.

<sup>19</sup> 558 F.2d at 1069.

<sup>20</sup> S. REP. NO. 1097, 90th Cong., 2d Sess. 100, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2189.

<sup>21</sup> 558 F.2d at 1068.

<sup>22</sup> *Id.*

<sup>23</sup> 480 F.2d 764 (2d Cir.), cert. denied, 414 U.S. 866 (1973).

<sup>24</sup> 480 F.2d at 783.

<sup>25</sup> 558 F.2d at 1068.

<sup>26</sup> 480 F.2d at 783.

<sup>27</sup> 558 F.2d at 1068.

In enacting Title III, Congress was aware of the serious constitutional questions raised by wiretapping and electronic surveillance,<sup>28</sup> and fashioned the carefully circumscribed procedures enu-

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<sup>28</sup> Until the enactment of Title III, neither Congress nor the Supreme Court had dealt comprehensively with the fourth amendment problems presented by wiretapping and electronic surveillance. The Supreme Court was first presented with the issue in *Olmstead v. United States*, 277 U.S. 438 (1928). There the Court held that governmental wiretapping is not a "search and seizure" within the meaning of the fourth amendment, reasoning that no physical intrusion into a private place is necessary to secure intercepted information. *Id.* at 464-66. Justice Brandeis argued in his dissent, however, that it is irrelevant that there is no physical trespass or tangible articles seized, since the protection guaranteed by the fourth amendment is broad enough in scope to cover any governmental interference with the individual's right of privacy. *Id.* at 478-79 (Brandeis, J., dissenting). Partly in response to *Olmstead*, Congress enacted § 605 of the Federal Communications Act of 1934, 48 Stat. 1103 (1934), which provides in part that "no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ." 47 U.S.C. § 605 (1970). In *Nardone v. United States*, 302 U.S. 379 (1937), the Court recognized that evidence intercepted in violation of § 605 is inadmissible in the federal courts. The decision was not based on constitutional grounds but on the Supreme Court's supervisory powers over the federal courts. *Id.* at 383. The *Nardone* Court held that § 605 mandates suppression of not only direct evidence, but also of evidence obtained from investigatory leads secured through wiretapping. Section 605 was later held to prohibit interception of intrastate as well as interstate communications. *Weiss v. United States*, 308 U.S. 321 (1939). In *Schwartz v. Texas*, 344 U.S. 199 (1952), it was held that although it is a federal crime for state officers to divulge wiretap evidence, § 605 does not prohibit the admission of such evidence in a state criminal proceeding. *Id.* at 203. Evidence obtained by state law enforcement officials under the auspices of state law and in violation of § 605, however, was held inadmissible in a federal criminal proceeding. *Id.*

Similar issues were raised in the electronic surveillance cases presented to the Supreme Court. As in *Olmstead*, the Court in *Goldman v. United States*, 316 U.S. 129 (1942), found that since there was no physical trespass committed by placing a "detectaphone" against an office wall, there was no violation of fourth amendment rights. The same rationale was adhered to in *On Lee v. United States*, 343 U.S. 747 (1952), in which it was held that there was no trespass and hence no constitutional violation where a federal agent concealed a small tape recorder under his clothes and engaged the defendant in an incriminating conversation. An actual trespass was found in *Silverman v. United States*, 365 U.S. 505 (1961), where a "spike mike" was inserted into the heating duct of defendant's apartment in order to overhear defendant's conversations. Although the *Silverman* Court expressly refused to reconsider the *Goldman* decision, it emphasized that its "decision . . . [did] not turn upon the technicality of a trespass . . . as a matter of local law. It [was] based upon the reality of an actual intrusion into a constitutionally protected area." *Id.* at 512. In so holding, the Court seems to have impliedly acknowledged that an intangible such as a conversation could be seized within the meaning of the Constitution. Shortly after *Silverman*, in *Wong Sun v. United States*, 371 U.S. 471 (1963), verbal statements were expressly recognized as seizable items: "[t]he exclusionary rule has traditionally barred from trial physical, tangible materials obtained either during or as a direct result of an unlawful invasion. It follows from our holding in *Silverman v. United States*, . . . that the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'" *Id.* at 485 (citation omitted). Despite the departure from *Olmstead* evident in *Wong Sun*, the Court reaffirmed the trespass doctrine in *Lopez v. United States*, 373 U.S. 427 (1963), holding that "[t]he Court has in the past sustained instances of 'electronic eavesdropping' against constitutional challenge, when devices have been used to enable govern-

merated therein to meet the standards established by the Supreme Court.<sup>29</sup> Section 2517(5) specifies in detail the manner in which intercepted conversations may be employed and the means of obtaining the subsequent judicial approval to use incidentally intercepted information evidencing an offense not enumerated in the wiretap authorization.<sup>30</sup> It is submitted that the Second Circuit's holding in *Masciarelli* misapplied the implicit-authorization rationale articulated in *Tortorello*; in so doing, the court seems to have rendered a decision inconsistent with both the express wording of section 2517(5) and its underlying congressional intent.

In *Tortorello*, an order authorizing a wiretap on defendant's telephone was issued, based on a finding that there existed probable cause to believe that the defendant was committing various state

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ment agents to overhear conversations . . . . It has been insisted only that the electronic device not be planted by an unlawful physical invasion of a constitutionally protected area." *Id.* at 438-39 (citations omitted). The concept that there could be no fourth amendment violation unless there was a physical trespass into a protected area was finally laid to rest in *Katz v. United States*, 389 U.S. 347 (1967). See note 29 *infra*.

<sup>29</sup> The decisions in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), prescribed the requirements that must be satisfied before an interception of a wire or oral communication will be deemed constitutional. The Court in *Berger* was presented with the question of the constitutional validity of the New York wiretapping statute, ch. 924, § 813-a, [1942] N.Y. Laws 2030 (repealed 1968). Using the language in *Berger* as a guide, Congress delineated the following factors as necessary to render a wiretapping statute constitutional:

(1) Particularity in describing the place to be searched and the person or thing to be seized.

(2) Particularity in describing the crime that has been, is being, or is about to be committed.

(3) Particularity in describing the type of conversation sought.

(4) Limitations on the officer executing the eavesdrop order which would (a) prevent his searching unauthorized areas, and (b) prevent further searching once the property sought is found.

(5) Probable cause in seeking to renew the eavesdrop order.

(6) Dispatch in executing the eavesdrop order.

(7) Requirement that the executing officer make a return on the order showing what was seized.

(8) A showing of exigent circumstances in order to overcome the defect of not giving prior notice.

S. REP. NO. 1097, 90th Cong., 2d Sess. 100, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2161-62. Although the Court laid down a stringent standard against which eavesdropping procedures must be measured, it did not directly deal with the problem of the trespass doctrine enunciated in *United States v. Olmstead*, 277 U.S. 438 (1928), and *Goldman v. United States*, 316 U.S. 129 (1942), discussed in note 28 *supra*, since the case involved a nontrespassory intrusion. In *Katz*, however, the Court specifically overruled both *Olmstead* and *Goldman* concluding that "once it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." 389 U.S. at 353.

<sup>30</sup> See 18 U.S.C. § 2517(5) (1970).

offenses.<sup>31</sup> This order was renewed or extended five subsequent times. Accompanying each application for renewal were affidavits setting forth the progress of the investigation and giving a daily summary of the intercepted calls. During the course of the surveillance, evidence of a securities fraud violation was incidentally intercepted.<sup>32</sup> The securities fraud conversation was fully detailed in the next affidavit submitted in support of renewal of the wiretap, and the order approving the renewal incorporated by reference this affidavit.<sup>33</sup> The Second Circuit held that by approving the renewal of the wiretap, the lower court judge had implicitly authorized, under section 2517(5), the use of the incidentally intercepted evidence to establish the securities fraud conviction.<sup>34</sup> The *Tortorello* court found that from the supporting affidavits it could be determined that the original application was made in good faith and not as a pretext for uncovering evidence of the securities offense. In addition, the Second Circuit noted that the affidavit in support of renewal expressly stated that the conversation in issue related to a possible securities violation.<sup>35</sup> Reasoning that Title III does not require a judge to make an in-court pronouncement that evidence of a crime unspecified in the original order had been properly obtained, and that a "judge presumably will scrutinize any application and will scrupulously impose the restrictions required by statute,"<sup>36</sup> the *Tortorello* court concluded that the filing of the renewal and amendment application papers, followed by the actual renewal of the wiretap, constituted sufficient compliance with the statute.<sup>37</sup>

Unlike *Tortorello*, where the district court judge was informed of the incidental interception in a renewal application, the conversation relating to the unspecified offense was brought to the judge's attention in *Masciarelli* via a progress report.<sup>38</sup> The statutory function of these two instruments differs considerably. While a renewal or extension application might be an appropriate vehicle for obtaining implicit authorization under section 2517(5), it is suggested that a progress report is inappropriate as a means of obtaining such approval. Extension applications must satisfy the same procedural

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<sup>31</sup> 480 F.2d at 770.

<sup>32</sup> *Id.* at 771.

<sup>33</sup> *Id.* at 782.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 783.

<sup>37</sup> *Id.*

<sup>38</sup> 558 F.2d at 1065.



requirements as requests for original wiretap orders,<sup>39</sup> procedures established to meet the fourth amendment's requirements of probable cause and particularity.<sup>40</sup> The progress report, on the other hand, must be filed only when the issuing judge in his discretion so directs, and functions in an entirely different manner.<sup>41</sup> The language of Title III furnishes only a sketchy indication of the progress report's use,<sup>42</sup> but the legislative history specifies that the function of these reports, *when required*, is to ensure that the minimization requirements of the statute are followed, *i.e.*, that the interception is not carried on for longer than is necessary to obtain evidence of the specified offense.<sup>43</sup> Progress reports thus serve "as a check on the continuing need to conduct the surveillance" during the period of the original order.<sup>44</sup>

In considering an extension application, a judge is compelled to scrutinize it carefully in order to make the requisite findings of probable cause.<sup>45</sup> Where the judge determines that probable cause continues to exist and grants the extension, inherent in that determination, it is submitted, is a finding that the original application was made in good faith and that any intercepted conversation evidencing a crime unspecified in the original order was incidentally and properly intercepted. Consequently, an implied authorization based on an extension order, as found in *Tortorello*,<sup>46</sup> would seem to satisfy the 2517(5) requirement of subsequent judicial approval. No such judicial scrutiny is necessary when a progress report is filed.<sup>47</sup> The court need only casually read the report in order to assess the progress of the investigation and determine whether sur-

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<sup>39</sup> See 18 U.S.C. § 2518(5) (1970); S. REP. NO. 1097, 90th Cong., 2d Sess. 103, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2192.

<sup>40</sup> During the Senate debates on Title III, it was argued that a new showing of probable cause for an extension of the wiretap order is necessary to prevent the intrusion from becoming a general search in violation of the fourth amendment. 114 CONG. REC. 14, 486 (1968).

<sup>41</sup> The notion of a progress report seems to stem from the concern expressed in *Berger v. New York*, 388 U.S. 41 (1967), with respect to judicial oversight of on-going wiretaps. See *id.* at 57. One author has suggested that if progress reports were made mandatory, they would act as an added safeguard ensuring active judicial supervision over the intercept process. Linzer, *Federal Procedure for Court Ordered Electronic Surveillance: Does it Meet the Standards of Berger and Katz*, 60 J. CRIM. L.C. & P.S. 203, 212 (1969).

<sup>42</sup> See 18 U.S.C. § 2518(6) (1970), *quoted in* note 7 *supra*.

<sup>43</sup> See S. REP. NO. 1097, 90th Cong., 2d Sess. 104, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 2112, 2193.

<sup>44</sup> *Id.*

<sup>45</sup> See *United States v. Tortorello*, 480 F.2d 764, 782 (2d Cir.), *cert. denied*, 414 U.S. 866 (1973); *accord*, *United States v. Cox*, 449 F.2d 679, 687 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972).

<sup>46</sup> 480 F.2d at 781-83.

<sup>47</sup> See notes 43-44 and accompanying text *supra*.

veillance should continue for the remaining period of the original order.<sup>48</sup> Since Title III does not require any findings as a prerequisite to approval of such a continuance, it would seem strained to premise a 2517(5) authorization, which requires findings of good faith and probable cause,<sup>49</sup> upon that approval.

Section 2517(5) clearly indicates that an application for authorization under that section must be made.<sup>50</sup> As in the case of a traditional search warrant, a Title III application, whether it be for renewal or an original order, must be supported by oath or affirmation.<sup>51</sup> Thus, it is upon the basis of the information culled from an affidavit that a judge makes his determination of probable cause.<sup>52</sup> Affidavits need not, however, accompany a progress report;<sup>53</sup> the report merely summarizes the intercepted calls to apprise the judge of the tenor of the investigation.<sup>54</sup> It would appear anomalous to conclude that the application requirement of section 2517(5) could be satisfied by anything less than what is required to support a renewal or original application; nothing in either the legislative history or the statute suggests that affidavits need not be filed in support of a section 2517(5) application.<sup>55</sup> Therefore, as an independent ground for not basing a 2517(5) authorization upon a progress re-

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<sup>48</sup> See *id.*

<sup>49</sup> See S. REP. NO. 1097, 90th Cong., 2d Sess. 100, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2189.

<sup>50</sup> See 18 U.S.C. § 2517(5) (1970); S. REP. NO. 1097, 90th Cong., 2d Sess. 100, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2189.

<sup>51</sup> Title III provides in pertinent part: "Each application for an order authorizing . . . the interception of a . . . communication shall be made in writing upon oath or affirmation . . ." 18 U.S.C. § 2518(1) (1970).

<sup>52</sup> As a warrant issued under Title III must be supported by statements made under oath or affirmation giving rise to an inference of probable cause, it is the affidavit, a sworn written instrument, which provides the basis for the issuance of the warrant. The Supreme Court in *Berger v. New York*, 388 U.S. 41 (1967), expressly indicated that an affidavit, particular in its recitation of facts, would form the basis for a determination of probable cause under a constitutional wiretapping statute. *Id.* at 57.

<sup>53</sup> The legislative history of Title III is devoid of any indication that a sworn statement such as an affidavit is required under § 2518(5). See S. REP. NO. 1097, 90th Cong., 2d Sess. 104, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2193, wherein it is merely stated that an "order may require reports to be made to the judge . . ." (emphasis added).

<sup>54</sup> See notes 43-44 and accompanying text *supra*.

<sup>55</sup> In its discussion of § 2517(5), the legislative history indicates that the application necessary for § 2517(5) approval must make a "showing" that the original order was requested in good faith rather than as a pretext and that the evidence sought to be admitted was incidentally intercepted. S. REP. NO. 1097, 90th Cong., 2d Sess. 100, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2189. While § 2517(5) does not employ express language indicating that an oath or affirmation is required, it is submitted that in order to promote statutory consistency and curtail abuses the requisite "showing" must be supported by a sworn statement setting forth facts from which a judge might make a proper determination as to the admissibility of 2517(5) evidence. See note 64 *infra*.

port, it is submitted that the authorization should not be granted in the absence of an application accompanied by affidavits, as the statute arguably requires.

Electronic surveillance, unlike conventional searches in which seizure is limited to specifically identified items, "is a quest for something which may happen in the future."<sup>56</sup> As a result, electronic surveillance, by its nature, comes into conflict with the fourth amendment requirement that a warrant describe with particularity "the things to be seized."<sup>57</sup> Nevertheless, in enacting Title III, Congress has attempted to comply with the fourth amendment's dictates by imposing various safeguards, including extensive judicial oversight.<sup>58</sup> Throughout the history of its fourth amendment decisions, the Supreme Court has been steadfast in its insistence that a warrant not be issued in the absence of judicial scrutiny.<sup>59</sup> In the realm of wiretapping, Supreme Court decisions have emphasized not only the need for particularity with regard to electronic surveillance orders, but also this requirement of antecedent judicial approval.<sup>60</sup> Yet, section 2517(5) embodies neither of these requirements.<sup>61</sup> Although it may perhaps be sustained<sup>62</sup> by analogy to the

<sup>56</sup> Spritzer, *Electronic Surveillance by Leave of the Magistrate: The Case in Opposition*, 118 U. PA. L. REV. 169, 189 (1969).

<sup>57</sup> U.S. CONST. amend. IV. As one commentator has noted:

It is doubtful . . . that a court order authorizing electronic eavesdropping can comply with the "warrant clause" of the fourth amendment. The provision of the warrant clause which seems to defy compliance is the requirement that a search warrant must particularly describe the "things to be seized." A specific description of the conversation to be "seized" in the future is impossible since the words have not yet come into existence . . . . Due to the nature of electronic eavesdropping, it seems apparent that a court order cannot meet the particularization requirement of the warrant clause . . . .

Note, *The Constitutionality of Electronic Eavesdropping*, 18 S.C.L. REV. 835, 837 (1966) (footnotes omitted).

<sup>58</sup> In enacting Title III, Congress clearly intended that the statute meet constitutional standards as enunciated by the Supreme Court. See S. REP. NO. 1097, 90th Cong., 2d Sess. 71, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2163. For decisions upholding Title III in the face of a constitutional challenge, see *United States v. Kirk*, 534 F.2d 1262 (8th Cir. 1976); *United States v. Ramsey*, 503 F.2d 524 (7th Cir. 1974), cert. denied, 420 U.S. 932 (1975); *United States v. Martinez*, 498 F.2d 464 (6th Cir.), cert. denied, 419 U.S. 1056 (1974).

<sup>59</sup> See, e.g., *Coolidge v. New Hampshire*, 403 U.S. 443, 449 (1971); *Beck v. Ohio*, 379 U.S. 89, 96 (1964); *Lopez v. United States*, 373 U.S. 427, 464 (1963) (Brennan, J., dissenting); *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

<sup>60</sup> See note 29 *supra*.

<sup>61</sup> It should be noted that the constitutionality of § 2517(5) has been upheld by some federal courts. See, e.g., *United States v. Cox*, 449 F.2d 679, 687 (10th Cir. 1971), cert. denied, 406 U.S. 934 (1972); *United States v. Sklaroff*, 323 F. Supp. 296, 307-08 (S.D. Fla. 1971), aff'd, 506 F.2d 837 (5th Cir. 1975); *United States v. Escandar*, 319 F. Supp. 295, 300-01 (S.D. Fla. 1970), rev'd on other grounds sub nom. *United States v. Robinson*, 468 F.2d 189 (5th Cir.

"plain-view" exception to the warrant requirement,<sup>63</sup> section 2517(5) thus treads on sensitive constitutional ground.<sup>64</sup> It is sub-

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1972). But see Schwartz, *The Legitimation of Electronic Eavesdropping: The Politics of "Law and Order,"* 67 MICH. L. REV. 455, 465 (1968); Note, *Eavesdropping Provisions of the Omnibus Crime Control and Safe Streets Act of 1968: How do they Stand in Light of Recent Supreme Court Decisions?*, 3 VAL. L. REV. 89, 94 (1968). Professor Schwartz has argued that § 2517(5) disregards the thrust of *Marron v. United States*, 275 U.S. 192, 196 (1927), in which the Court stated that "[t]he requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." Schwartz, *supra*, at 465. While Professor Schwartz cited *United States v. Eisner*, 297 F.2d 595 (6th Cir.), *cert. denied*, 369 U.S. 859 (1962) and *Johnson v. United States*, 293 F.2d 539 (D.C. Cir. 1961), *cert. denied*, 375 U.S. 888 (1963), as examples of lower federal courts ignoring the import of *Marron*, both these cases employed the "plain-view" doctrine to uphold the seizure of evidence without a search warrant. The plain-view doctrine, however, if properly applied, is not inconsistent with *Marron*. See note 63 *infra*.

<sup>62</sup> The Supreme Court has not as yet directly upheld the constitutionality of Title III. It has had occasion, however, to interpret various provisions of the statute. See, e.g., *United States v. Donovan*, 97 S. Ct. 658 (1977) (§ 2518(8)(d) does not mandate service of discretionary notice); *United States v. Giordano*, 416 U.S. 505 (1974) (§ 2516(1) authorizes only Attorney General or his assistant to issue wiretap orders); *United States v. Kahn*, 415 U.S. 143 (1974) (§ 2518(1)(b)(iv) requires order to name only known users of the target telephone participating in the intercepted conversation).

<sup>63</sup> Although the fourth amendment requires that a warrant describe with particularity the items to be seized, courts over the years have fashioned exceptions which recognize that the practicalities of effective law enforcement require some flexibility. The plain-view doctrine is one such exception. Under this theory, evidence not specified in a warrant may nevertheless be admitted if three requirements are met. The evidence seized must have been in open-view and not concealed. *Harris v. United States*, 390 U.S. 234, 236 (1968). That the evidence was in plain view is not in and of itself enough, however, to justify seizure. *Trupiano v. United States*, 334 U.S. 699 (1948). Seizure is only proper where the law enforcement agent had a legal right to be in a position to view the seized item. See *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971); *Harris v. United States*, 331 U.S. 145, 153 (1947). In addition, the discovery of the evidence must be inadvertent. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971).

The plain-view doctrine is applicable in several situations. Where the police are operating under a valid warrant and inadvertently discover incriminating evidence, that evidence may be admissible under the doctrine. See *United States v. Lefkowitz*, 285 U.S. 452 (1932); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931); *Steele v. United States*, 267 U.S. 498 (1925). Plain-view evidence is admissible if discovered by police in "hot pursuit" of a fleeing suspect." *Warden v. Hayden*, 387 U.S. 294 (1967). In addition, evidence in plain view during a search incident to a valid arrest may properly be seized. See *Coolidge v. New Hampshire*, 403 U.S. 443 (1971); *Harris v. United States*, 331 U.S. 145 (1947). Finally, evidence discovered through pure inadvertence is admissible. See *Harris v. United States*, 390 U.S. 234 (1968). It is important to note that a plain-view seizure cannot disintegrate into the kind of general search proscribed under the fourth amendment, see, e.g., *Marron v. United States*, 275 U.S. 192, 195-96 (1927); *Boyd v. United States*, 116 U.S. 616, 624-30 (1886), because it is limited to those objects which come into plain view as a result of the initial valid intrusion. Thus, no proper plain-view seizures can be made while an officer is exceeding the scope of a warrant. See *Coolidge v. New Hampshire*, 403 U.S. 443, 467-70 (1971).

<sup>64</sup> While the plain-view analogy has been invoked as a basis for upholding the constitutionality of § 2517(5), see *United States v. Sklaroff*, 323 F. Supp. 296, 307 (S.D. Fla. 1971),

mitted, therefore, that this provision should be interpreted strictly in accordance with its language and accompanying legislative history.<sup>65</sup>

*aff'd*, 506 F.2d 837 (5th Cir. 1975); *United States v. Escandar*, 319 F. Supp. 295, 300-01 (S.D. Fla. 1970), *rev'd on other grounds sub nom. United States v. Robinson*, 468 F.2d 189 (5th Cir. 1972), it is an imperfect analogy at best. A traditional search warrant describes with particularity the items to be seized and thereby limits the scope of the intrusion. It is this initial limitation that distinguishes a plain-view seizure from a general search. *See Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Once a law enforcement agent exceeds the limitations established by the warrant, he cannot properly make any plain-view seizures.

The wiretap warrant on the other hand, can never describe with particularity the conversation to be seized. It is impossible to give a "specific description of the conversation to be 'seized' in the future . . . since the words have not yet come into existence . . ." Note, *The Constitutionality of Electronic Eavesdropping*, 18 S.C.L. REV. 835, 837 (1966). The wiretap warrant, therefore, authorizes a much broader search, giving the eavesdropper far more latitude in effecting seizures under the traditional plain-view doctrine.

Of equally grave social if not constitutional importance is the nature of the seized item. Under the historical plain-view approach, the things seized were tangible property. In the wiretapping area, however, it is thoughts and conversations that are intercepted. A Congressional awareness of the sensitivity of this type of search is evidenced in the legislative history of Title III:

The tremendous scientific . . . developments that have taken place . . . have made possible . . . the widespread use and abuse of electronic surveillance techniques . . . [P]rivacy of communication is seriously jeopardized . . . No longer is it possible . . . for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, mental, religious, political or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

S. REP. NO. 1097, 90th Cong., 2d Sess. 67, reprinted in [1968] U.S. CODE CONG. & AD. NEWS 2112, 2154.

Balanced against these constitutional and social concerns is the notion that the state should not be prevented from using information inadvertently obtained to prosecute or prevent crimes. Cognizant of these conflicting principles, Congress, in providing for admission of § 2517(5) evidence, attempted to codify the plain-view doctrine in a manner which would provide maximum protection to the individual, i.e., by requiring subsequent judicial approval to use inadvertently intercepted evidence. Strict compliance with the requirements of § 2517(5), therefore, appears to be the best way to ensure as close adherence to fourth amendment requirements as is practicable. Clark, *Wiretapping and the Constitution*, 5 CALIF. W.L. REV. 1, 6 (1968).

<sup>65</sup> In *United States v. Marion*, 535 F.2d 697 (2d Cir. 1976), the Second Circuit hesitantly applied the *Tortorello* rationale noting

that such implicit authorization procedures are susceptible to possible uncertainty as they are reviewed for their consonance with § 2517(5).

We would hope, therefore, in view of the clear dictates of our ruling in this case, that in the future law enforcement officials will as a matter of prudence seek to secure explicit approval of such incidental interceptions. Such efforts should not be unduly burdensome . . . particularly where the issuing judge has been made aware of the results of the surveillance operation while it is still in progress.

*Id.* at 707-08 n.21. Other circuits have expressed a similar concern. *See, e.g., United States v. Brodson*, 528 F.2d 214, 216 (7th Cir. 1975); *United States v. Moore*, 513 F.2d 485, 502-03 (D.C. Cir. 1975); *United States v. Cox*, 449 F.2d 679, 687 (10th Cir. 1971), *cert. denied*, 406 U.S. 934 (1972); *In re United States*, 427 F.2d 639, 643 (9th Cir. 1970).

In finding implicit approval on the basis of information brought to light in a progress report, the Second Circuit in *Masciarelli* seems to have overlooked the constitutionally sensitive nature of section 2517(5) and misconstrued the nature and import of the progress report. As an informal, unsworn document from which no specific judicial findings need be drawn, the report seems inappropriate as a basis for subsequent court approval under section 2517(5). By analogizing a progress report to the renewal and amendment applications which served as the foundation for the *Tortorello* implicit-authorization rationale, it is submitted that the *Masciarelli* court has unwisely extended the *Tortorello* holding. It is hoped that the Second Circuit will reevaluate the *Masciarelli* holding and opt for a position more consistent with Title III's procedural requirements, which were designed to ensure, to the extent possible, individual freedom from unwarranted intrusion.

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